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IN THE

Supreme Court of the United States

October Term, 1940

No. 774

O. C. ALTMAIER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND MEMORANDUM IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

O. C. Altmaier, a resident of Columbus, Ohio, represents to this Honorable Court that he has been aggrieved by a certain final judgment of the United States Circuit Court of Appeals for the Sixth Circuit, lately passed in the case pending in that court numbered 8367 upon its files and dockets, wherein said O. C. Altmaier is petitioner and the Commissioner of Internal Revenue is respondent.

Invoking Section 240(a) of the Judicial Code (United States Code, Title 28, Section 347), as amended by the Act of Congress approved February 13, 1925, C. 229, Section 1, 43 Stat. 938, said O. C. Altmaier petitions that said Circuit Court of Appeals for the Sixth Circuit may be required by

a writ of *certiorari* to certify said cause in its entirety to this court for its review and determination.

Petitioner represents that the final judgment complained of was passed and entered by the said Circuit Court of Appeals for the Sixth Circuit (Cir. JJ. Hicks, Arant and Martin sitting) on the 13th day of December, 1940 (R. 89).

The opinion of said Circuit Court of Appeals—Member Martin, Circuit Judge—is reported in 116 F. 2d 162, and may be found in the record at pages 90 to 95.

Final judgment of the trial court, namely, the United States Board of Tax Appeals (Ernest VanFossan, Member, sitting) appears at page 60 of the record and the findings of fact and opinion of the court appear at pages 52 to 60 thereof.

SUMMARY STATEMENT OF CAUSE OF ACTION AND RULINGS BY THE LOWER COURTS

On March 13, 1936, respondent, the Commissioner of Internal Revenue, issued to petitioner a deficiency notice in which petitioner was advised that the Commissioner proposed to assess additional federal income taxes for the years 1932 and 1933 as follows:

	Deficiency
1932.	$ 6,862.80
1933.	9,311.74
Total.....	$16,174.54

Said proposed deficiencies in federal income taxes for said years were based almost entirely upon respondent's contention that petitioner should include in his taxable income for said years the income realized by three trusts created by petitioner on February 18, 1932, respondent contending that the income of said trusts so created by petitioner was taxable to him under the provisions of Section

167 of the Revenue Act of 1932 (R. 13 and 14). Respondent thus increased petitioner's income for the year 1932 by $28,800 and for the year 1933 by $42,727.43 (R. 10, 11 and 57).

In said notice of deficiency respondent abandoned a proposition theretofore adopted by him, namely, that petitioner's wife (Mary Kaufman Altmaier) did not have a "substantial beneficial interest" in each of said trusts, specifically holding that petitioner's wife did hold "a substantial beneficial interest in each of said trusts" (R. 13).

On June 5, 1936, petitioner filed before the United States Board of Tax Appeals his petition alleging, among other things, that the $28,800 income for the year 1932 and the $42,727.43 income for the year 1933 thus added by respondent to petitioner's income for said years, did not represent taxable income to petitioner but that said items of income were properly taxable to the fiduciaries of said three trusts and that federal income taxes upon said income had been paid by said fiduciaries (R. 3 to 50).

Respondent filed his answer consisting of a general denial (R. 51) but at the time of trial of the cause before the United States Board of Tax Appeals counsel for respondent stated that the issue was the taxability to petitioner of the income of said three trusts under Section 167 of the Revenue Act of 1932.

The United States Board of Tax Appeals found (R. 59 and 60) that the income of said trusts was being held or accumulated for future distribution to the grantor and that said income was properly taxable to petitioner under the provisions of Section 167 of the Revenue Act of 1932, thus affirming the Commissioner's action.

Upon review applied for by petitioner the United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the United States Board of Tax

Appeals (R. 90 to 95). A summary of the pertinent facts found in the opinion of the reviewing court and in the record might be restated as follows:

1. Petitioner by three trust instruments all executed February 18, 1932, constituted his wife (Mary Kaufman Altmaier) trustee of a total number of 3600 shares of the common stock of a corporation.

2. The documents were identical except that the three minor children of the petitioner and his wife were each respectively named as co-beneficiary with the wife in one of the three separate trust indentures.

3. Shortly after the trusts became operative, pursuant to power reserved by the petitioner, The City National Bank of Columbus, Ohio, was appointed co-trustee with Mrs. Altmaier.

4. Each of the three agreements provided, *inter alia*, that, subject to the rights reserved to the settlor and his wife, the trustee should hold, manage and control the trust estate under the granted rights and powers.

5. Provision was made that the net income of the trust estate in each instance should be accumulated, invested and added to the principal during the remainder of petitioner's life or until his wife's death should she predecease him.

6. Each trust indenture directed the trustee to pay beginning at the death of petitioner, the entire net income to the wife for the remainder of her life; unless prior to her death, the trust fund should be exhausted as a result of permitted encroachments upon the principal.

7. The trustee was directed to pay, beginning at the death of the wife, the entire net income to the settlor for the remainder of his life.

8. Upon the death of the surviving husband or wife the trustee had the imposed duty of distribution to settlor's

named child, or to the latter's next of kin, in compliance with the elaborate provisions of the trust agreement.

9. During petitioner's lifetime or until he should be judicially declared legally incompetent, petitioner and his wife were given the right, jointly, by instrument in writing directed to the trustee, to alter, amend, revoke or terminate the trust agreement, or to withdraw any property at any time comprising a portion of the trust estate.

10. If petitioner should survive his wife, he could, by instrument in writing directed to and accepted by the trustee, exercise singly the same powers of alteration or termination.

11. On February 18, 1932, petitioner was 44 years of age. Petitioner's wife, Mary Kaufman Altmaier, was 40 years of age. Petitioner's son, John Martin Altmaier, was 14 years of age. Petitioner's son, Robert David Altmaier, was 12 years of age. Petitioner's daughter, Mary Elizabeth Altmaier, was four years of age, and on December 31, 1933, all of said individuals were living (R. 71).

From the foregoing facts the reviewing court reached the following conclusions:

> (a) The accumulated income of the three trusts in question might inure to the benefit of the grantor and therefore said income was taxable to petitioner under Section 167(a) (1) of the Revenue Act of 1932. In reaching this conclusion the court relied upon the rule announced in *Kaplan vs. Commissioner,* 66 F. 2d 401, 402 (C. C. A. 1).
>
> (b) The fact that petitioner's right to acquire accumulated income of the trust estates depends entirely upon the mere possibility that he shall survive his wife—a circumstance over which he has no control—is no justification for excluding the income of said trusts from the application of the provisions of Section 167(a) (1). In reaching this conclusion the court relied upon the rule announced in *Helvering vs. Hallock,* 309 U. S. 106 (Jan. 29, 1940), and *Klein vs. United States,* 283 U. S. 231, and specifically over-

ruled its own decision in this respect announced in *Corning vs. Commissioner,* 104 F. 2d 329 (C. C. A. 6; June 6, 1939).

(c) Petitioner's wife, Mary Kaufman Altmaier, did not have a substantial adverse interest in said trusts within the meaning of the statute, since she was a member of petitioner's family, and therefore the provisions of Section 167(a) (2) apply for the reason that even during the lifetime of the wife, by joint instrument in writing, the husband and wife would be privileged to withdraw the accumulated income and pay it over to the settlor, and for the reason that the husband and wife acting jointly could terminate the trust at any time. In reaching this conclusion the court relied upon the rule announced in *Helvering vs. Clifford,* 309 U. S. 331.

THE NECESSITY FOR CERTIORARI

Petitioner herein respectfully asserts that the decision of the United States Circuit Court of Appeals in this cause is in conflict with the decisions of other Circuit Courts of Appeals on the same matter; that said United States Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court; that United States Circuit Courts of Appeals in applying the rule announced by this court in *Helvering vs. Hallock* (*supra*) to other forms of federal taxation have reached different and conflicting conclusions with the result that utter confusion exists as to the correct method of applying the rule so announced; and that the United States Circuit Court of Appeals in this case, contrary to the rule announced by this court in *Helvering vs. Wood,* 309 U. S. 344, erroneously decided this case upon an issue which had been previously abandoned and waived by respondent.

THE CONFLICTING DECISIONS

(a) The rule announced in *Kaplan vs. Commissioner, supra,* which was followed by the reviewing court in the

instant case is directly contrary to the rule announced by the Circuit Court of Appeals for the Second Circuit in the case of *Commissioner vs. Waterbury*, 97 F. 2d 383, *certiorari* denied, 305 U. S. 638, with the result that the decision of the reviewing court in the instant case in this respect is also contrary to the rule announced in *Commissioner vs. Waterbury, supra.*

(b) The reviewing court in the instant case places an interpretation upon the rule announced in *Helvering vs. Hallock, supra,* which is directly contrary to the interpretation placed upon the same decision by the Circuit Court of Appeals for the Second Circuit in the case of *Herzog et al. vs. Commissioner*, a case involving federal gift taxes decided on January 6, 1941.

(c) The reviewing court in the instant case places an interpretation upon the decision rendered in the case of *Helvering vs. Clifford, supra,* which is exactly contrary to the interpretation placed upon said decision by the Circuit Court of Appeals for the First Circuit in the case of *Commissioner vs. Branch*, 114 F. 2d 985.

In view of the foregoing and in the interest of securing uniformity of decisions among the several Circuit Courts of Appeals and for the purpose of correcting a decision of the Circuit Court of Appeals for the Sixth Circuit on a question of general federal income tax law which said court has decided in a way in conflict with the weight of authority and in conflict with the meaning and intent of the statutes themselves and consequently in a way probably untenable, it is respectfully prayed that *certiorari* may be granted herein.

JOHN J. KENDRICK,
Counsel for Petitioner.

STATE OF OHIO, LUCAS COUNTY, *ss.*

John J. Kendrick, being duly sworn, says: I am one of the attorneys for the taxpayer in this proceeding; I prepared the foregoing petition and am familiar with the contents thereof; the allegations of fact contained therein are true to the best of my knowledge, information and belief; this petition is not filed for the purpose of delay, and I believe that petitioner is justly entitled to the writ sought.

JOHN J. KENDRICK.

Sworn to before me and subscribed in my presence this .....day of February, 1941.

C. I. BITZ,

(Seal) *Notary Public, Lucas County, Ohio.*

My commission expires January 6, 1942.